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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1945.

No. [redacted] 109

MERCHANTS and MANUFACTURERS ASSOCIATION OF LOS ANGELES, a California corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Merchants and Manufacturers Association of Los Angeles, a California corporation, petitions this Honorable Court and prays that a Writ of Certiorari may issue to review the judgment of the Ninth Circuit Court of Appeals entered August 30, 1945, and amended March 2, 1946, in the case entitled "National Labor Relations Board, Petitioner, vs. Sun Tent-Luebbert Company, *et al.*, Merchants and Manufacturers Association of Los Angeles, Respondents," No. 10533 in said Circuit Court. Said judgment as amended was entered upon a petition filed by the National Labor Relations Board for a Writ

of Enforcement of the Order made and entered by the Board on November 29, 1941, in the matter entitled "Sun Tent-Luebbert Company; California Canvas Jobbers Club; Southern Californians, Inc.; The Neutral Thousands, Inc.; G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service; and Merchants and Manufacturers Association of Los Angeles and Textile Workers Union of America, Local No. 99, C. I. O. and Independent Canvas Workers Union, Inc., Party to the Contract, Case No. XXI-C-1007, etc."

I.

Summary Statement of Matter Involved.

The National Labor Relations Board filed a complaint against the Sun Tent-Leubbert Company and three other canvas manufacturing companies, and against the Merchants and Manufacturers Association of Los Angeles (hereinafter for convenience referred to as M & M), and three other so-called institutional respondents charging a violation of the National Labor Relations Act. Section 10 of the complaint charged all of the respondents together with a violation of Section 8(2) of the Act in that they "did instigate and form a labor organization referred to herein as the Independent, and since that date said respondents continuously have dominated and interfered with the formation and administration of said labor organization by the following acts," specifying a series of acts in support of the general allegation. By Section 12 of the complaint the respondents were likewise specifically charged with violation of Section 8(1) of the Act "by instigating, permitting, acquiescing in and causing the acts set forth in the preceding paragraph 10 and by other acts did interfere with, restrain, and coerce

their employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, and by these acts and each of them did engage in and are engaging in unfair labor practices within the meaning of Section 8, subsection (1) of said Act."

The Board, after extended hearings, found that the Independent Union was company dominated and issued its order against all of the respondents in accordance with the intermediate report and recommendations of the trial examiner. Exceptions were filed to the intermediate report and argument was had before the Board in which all of the questions hereinbelow specified were raised and argued without effect.

The Board thereafter petitioned the Circuit Court of Appeals for the Ninth Circuit for a judgment enforcing the order of the Board. The matter was argued and briefed and the points theretofore raised before the Board and other questions of law were briefed and argued before the Ninth Circuit Court of Appeals. The Circuit Court of Appeals thereafter under the date of August 30, 1945, made and entered its judgment enforcing in part the order of the Board, but limiting the scope of the Board's order so far as it affected this petitioning respondent. Both this respondent and the Board petitioned the Circuit Court for a rehearing, and such petitions were denied by order of the court on December 28, 1945. Thereafter the Circuit Court on its own initiative by order entered March 2, 1946, amended its former judgment and directed the enforcement of the order of the Board in its entirety, reinstating in the scope of its judgment those portions of the order of the Board which had formerly been omitted from the scope of the judgment of the court.

of Enforcement of the Order made and entered by the Board on November 29, 1941, in the matter entitled "Sun Tent-Luebbert Company; California Canvas Jobbers Club; Southern Californians, Inc.; The Neutral Thousands, Inc.; G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service; and Merchants and Manufacturers Association of Los Angeles and Textile Workers Union of America, Local No. 99, C. I. O. and Independent Canvas Workers Union, Inc., Party to the Contract, Case No. XXI-C-1007, etc."

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In the autumn of 1937 the Textile Workers Union affiliated with the C. I. O. and the Upholsters International Union affiliated with the A. F. of L. conducted an active campaign to organize all employees of the canvas companies. At the commencement of this campaign one of the canvas companies, Mellus Brothers & Company, Inc., was a member of M & M and the other canvas manufacturing companies joined M & M in the autumn of 1937. While this organizational campaign was in progress a subordinate employee of M & M, Ryerson by name, whose duty it was to obtain statistical data from employers relating to wages, job classifications, hours and working conditions, called upon respondents Rittenhouse and Huff requesting that they organize or set up an independent union for the entire canvas manufacturing industry, and according to Rittenhouse' testimony, Ryerson supplied or furnished names of employees within the canvas manufacturing companies, including some supervisory employees, through whom Rittenhouse and Huff operated and with whose assistance the independent union was set up.

Petitioner, Merchants and Manufacturers Association of Los Angeles, is a non-profit corporation, organized in 1896, "to promote the business interests of Los Angeles City and County and the country tributary thereto." At the time of the hearing there were in excess of twelve hundred members, drawn from all classes of industry and the professions; membership was available to "any person, firm, association or corporation doing a merchandising, manufacturing, banking, professional or other business requiring employment of unskilled, skilled or professional labor." M & M was maintained entirely by initiation fees and dues from members. No employees

of M & M are involved, there is no labor dispute of any kind between M & M and its employees, and no unfair labor practices are charged so far as M & M employees are concerned.

Southern Californians, Inc. (SCI), another institutional respondent, was a corporation organized as a non-profit corporation in the autumn of 1937, having approximately 440 institutional members among all kinds of industry, and 50 individual members, some of whom were likewise members of M & M. Eight members of the Board of Directors out of a total of fifty Board members of SCI were also directors of M & M. SCI was supported by dues from its members and contributors, and where there was a duality of membership between M & M and SCI, a remission of dues for one month was made by SCI. SCI from funds collected as a so-called "community chest" allocated $2000.00 per month to M & M for a period of eleven months for use in the industrial relation activities of M & M.

The Neutral Thousands (TNT) was a non-profit corporation, incorporated about the same time as SCI. It was almost entirely supported by SCI, contributions between November 17, 1947, and March 15, 1939, amounting to $87,000.00. Dues from members of TNT were negligible. Membership was largely among women. It was under the direction of Mrs. Bessie Ochs, and had in its employ Rittenhouse and Huff who operated as a co-partnership under the name of Employees Advisory Service.

Petitioner, M & M, is admittedly not engaged in any commerce or industry on its own account, and could only be classified as engaged in commerce within the meaning of the Act by reason of its relationship to one or more of

its members. It is not an employer within the meaning of the Act unless it comes within the statutory definition of an "employer" contained in Section 2, subsection 2 of the Act which defines an employer as follows: "The term employer includes any person acting in the interest of an employer, directly or indirectly, * * *" M & M is charged with unfair labor practices because of its relationship to one or more of its members and the alleged activities of one of its subordinate employees in connection with the organization of a company dominated union among employees of the canvas manufacturing companies.

The Board and the court relying upon so-called background evidence found that petitioner M & M caused the incorporation of many industrial trade associations which entered into illegal contracts, the forms of which were furnished by M & M; advised the associations to engage the bargaining services of efficient members of the local bar; and daily gave counsel to agents of TNT. Referring to such background evidence the Circuit Court held the Board was warranted in inferring that all of the petitioner's, M & M's, extended labor activities in Southern California in the years since the passage of the National Labor Relations Act were infected with illegality. It held that the facts showed that principal M & M activities after passage of the Act in 1935 were formation of free employment bureau and strike breaking service; that M & M furnished guards and detectives with a claimed guarding of plants, and formation of company dominated unions.

M & M is the only respondent resisting the order of enforcement of the Board. A copy of the order of the Board as it relates to M & M is as follows:

"3. Each of the respondents, Southern Californians, Inc., The Neutral Thousands, Inc., G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service, and Merchants and Manufacturers Association of Los Angeles, and the respective officers, directors, partners, agents, successors, and assigns of each of them, when acting severally, jointly, or in concert with the canvas companies, or any other employer, as agent for or in the interest of the canvas companies, or any such other employer, shall:

"a. Cease and desist from:

"(1) Dominating or interfering with the administration of Independent Canvas Workers Union, Inc., or with the formation or administration of any other labor organization of the *employees of the canvas companies, or any other employer,* and from contributing financial or other support to said Independent Canvas Workers Union, Inc., or to any other labor organization of the employees of the canvas companies, or any other employer;

"(2) Soliciting and collecting funds from the canvas companies, or any other employer, to be used in whole or in part for the *purpose of interfering with the rights guaranteed in Section 7 of the act;*

"(3) In any other manner interfering with, restraining, or coercing the *employees of the canvas companies, or of any other employer,* in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid and protection as guaranteed in Section 7 of the Act;

"b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(1) Immediately send notices in writing through the United States mails to all its members, contributors, supporters and those carried on its mailing list, including the canvas companies, stating that each of them will not engage in the conduct from which it is ordered to cease and desist in paragraphs 3a (1) to (3) inclusive;"

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, 28 U. S. C. A. 347, and under 29 U. S. C. A. 160(e).

III.

Questions Involved.

1. THE FOLLOWING QUESTIONS CONCERNING THE SCOPE OF THE INJUNCTION ARE INVOLVED:

(a) Can the court properly enjoin acts entirely remote from and disassociated with the violation of the act charged in the complaint, to-wit: "soliciting and collecting funds from * * * any other employer, to be used in whole or in part for the purpose of interfering with the rights guaranteed in Section 7 of the Act";?

(b) Can the injunction of the court properly bring within its orbit persons, corporations, and others who were neither parties to the action, nor involved in any charge of unfair labor practices, and who may not even be employers or engaged in commerce?

(c) Is not the injunction broader in its scope than any remedial action which might be justified by the evidence, in that, in addition to the foregoing specifications in (a) and (b), it orders this respondent to cease and desist "in any other manner interfering with, restraining, or coercing the employees of the canvas companies, or of any other employer, in the exercise of the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid and protection as guaranteed in Section 7 of the Act."?

2. Has the Right of Freedom of Speech Been Abridged?

(a) Is the order of the Board and judgment of the court broad enough effectually and directly to abridge the right of freedom of speech? This question is particularly pertinent as the judgment of the court affects this petitioner who is a third party and has no economic relationship to the employees of any employer.

(b) Does the order of the board and judgment of the court as amended indirectly abridge the right of freedom of speech which it could not do directly? To enjoin contributions from members and others under jeopardy of contempt of court is effectually to destroy the right and ability to speak on the subject of the open shop or any other similar subject, and thereby the right to speak freely is abridged as effectually as by a direct mandate.

3. Evidentiary Questions Involved.

(a) Is there any legal evidence whatsoever which supports the finding of the Board and judgment of the court that M & M is

(1) An Employer within the definition of the Act;

(2) Engaged in commerce within the meaning of the Act;

(b) Is there any evidence to support the finding of the Board and the judgment of the court that M & M is engaged in or committed any unfair labor practices whatsoever?

(c) Is there any legal evidence to support the finding of the Board that,

> "The unfair labor practices committed by the respondents with respect to the employees of the canvas companies were in fact executed as an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to such employees under the Act. Such coordinated plan, if again applied, will inevitably bring about a further concerted violation of the Act, similar in kind to the unfair labor practices found. Since the institutional respondents have publicly and persistently invited all employers of Southern California to enlist their services in introducing such plan among their employees, it is reasonable to assume, and we find, that the institutional respondents are fully equipped for, and ready to proceed with, the commission of similar unfair labor practices with respect to the employees of other employers, unless ordered to refrain from so doing,"?

(d) Is it legally permissible for the Board to admit hearsay evidence, secondary evidence, conclusions, and evidence entirely disconnected by time and circumstances with the facts complained of as unfair labor practices,

as (1) either background evidence, or (2) for the purpose of finding substantial facts upon which the order of the Board and judgment of the court as amended is necessarily predicated? Petitioner contends that such evidence is not legally admissible for either of these purposes.

4. Is the judgment of the court as amended in fact a violation of the Fifth and Fourteenth Amendments of the Constitution in that it deprives this petitioner of due process of law in any one or more of the following, particularly:

(a) That petitioner is charged with one particular violation of the Act, to-wit, the instigation and organization of a company dominated union, when in fact petitioner is convicted of another entirely different violation, namely, that, "the unfair labor practices committed by the respondents with respect to the employees of the canvas companies were in fact executed as an integral part of a coordinated scheme or plan designed by" this institutional petitioner "assisting all employers of Southern California in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to such employees under the Act."

(b) In that there is a total absence of any legal evidence that this petitioner committed any unfair labor practices or violated the Act in any respect; or

(c) That the order of the Board and judgment of the court enforcing such order deprives petitioner effectually of its right to contract with its members and contributors and to receive from such members and contributors initiation fees, dues and other contributions without a hearing in the action under jeopardy of subsequent contempt of court.

IV.

Reasons Relied on for Allowance of Writ.

Petitioner relies on the following reasons for the issuance of the Writ of Certiorari herein prayed for:

A. The Ninth Circuit Court of Appeals has decided the questions here involved in a way probably in conflict with, and petitioner verily believes it to be in conflict with, the applicable decisions of this court.

B. The Ninth Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be settled by this court, to-wit:

1. The scope of an injunction directed to an independent corporate entity that is a general industrial association, a party to the action, relating to employees of a member of that association;

2. The scope of an injunction affecting others not parties to the action or connected with the proceedings and possibly not employers or engaged in commerce within the meaning of the act;

3. The scope of an injunction and the correlative power of the court to punish for contempt the persons mentioned in 1 and 2 above based upon future acts of an equivocal character;

4. The scope of an injunction enforcing an order of the Board which restricts and limits under jeopardy of contempt of court the right and privilege to make and receive financial contributions from members of a general industrial association;

5. The scope of an injunction which indirectly abridges the right of freedom of speech as effectually as a direct mandate.

C. Important issues in the administration of the National Labor Relations Act are involved which should be determined by this Court, and for which the Writ of Certiorari should issue.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a day certain therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 10533, National Labor Relations Board, Petitioner, vs. Sun Tent-Luebbert Company, *et al.*, and Merchants and Manufacturers Association of Los Angeles, Respondents," and that the judgment of said Court therein be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated: May 8, 1946.

HARRY WILLIAM ELLIOTT,
JOHN F. GILBERT,
Counsel for Petitioner.

C. R. LESLIE,
Of Counsel.

Certificate of Counsel.

We hereby certify that the foregoing Petition is well founded and not interposed for delay.

HARRY WILLIAM ELLIOTT and
JOHN F. GILBERT,
Counsel for Petitioner.

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No. .....

MERCHANTS and MANUFACTURERS ASSOCIATION OF LOS ANGELES, a California corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I. The petitioner contends that the scope of the order of the Board and judgment of the court in its injunctive aspect goes beyond the limits of legal discretion as laid down by this court. A recent decision of this court in which this subject was exhaustively reviewed is *May Department Stores Co. v. N. L. R. B.*, 66 S. Ct. 203. The court properly pointed out "the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities." The court in the same case later clearly states,

"The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice * * * affecting commerce.'" The court in the case mentioned quotes with approval from *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426,

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." 312 U. S. at page 437.

This statement of law necessarily entails a consideration of the evidence, and an analysis of what constitutes evidence and what probative value the evidence has. Petitioner has never been charged with participating in or committing any unfair labor practice prior to the instant case, and has never been found guilty of having committed any unfair labor practices at any time or under any circumstances prior to the present case. Therefore, there is no "prior conviction" upon which the Board could rely. There is no threat of the commission of unfair labor practices. There is no strike or other labor trouble between petitioner and its employees and never has been. There is no threat of a violation of the Act or the commission of any unfair labor practice by the Board of Directors, any director individually, or any administrative agent. This would seem to bring the case within the ruling of the Board itself. In the case of *Roberts & Oaks and the Chamber of Commerce of Madison, South Dakota, etc.*, 50 N. L. R. B. 494, where it was determined by the Board that strong anti-union statements made by officers

of the Chamber of Commerce in their individual capacity were not an expression of the Chamber itself. Here there are no such statements or acts by the directors, or officers, or administrative officials of the petitioner. The United States Circuit Court for the Eighth Circuit in the case of *N. L. R. B. v. American Pearl Button Co. and Washington Chamber of Commerce, Washington, Iowa,* 149 F. (2d) 311, has followed the same reasoning in exonerating the Chamber of Commerce of any liability for statements or expressions of its officers and directors. The report says the court,

> "Certain witnesses were asked with reference to the discussion had at the meeting (of the directors of the Chamber of Commerce), but the important thing so far as the Chamber of Commerce is concerned, is not what the discussion was, but what action was taken. Whether individual members of the Chamber of Commerce after adjournment of the meeting, may have had further discussion, or even entered into some tacit understanding, would not be binding upon the Chamber of Commerce. Such action would be the responsibility of those who participated in it. What the opinion of such individuals might be as to the action taken can not be accepted in face of the unimpeached record as to what proceedings were in fact had."

The court declined to enforce the cease and desist order against the Chamber of Commerce. The Chief Justice in a concurring opinion states:

> "I do not have any doubt that expressions of hostility to union organization made by an employer to his employees, for the purpose of influencing their vote in a plant election, may, in the economic hold of a particular employment field or of some immediate

plant situation, amount to an improper interference with, and restraint and coercion of, the right of self-organization. But I have no less certainty of conviction that such expressions made by a third party, who is not shown by the evidence to have any legal identity with the employer, or to possess a separate coercive hold upon the employees, or where such a hold exists, to have attempted to exercise it, as by threats, express or implied, of capable reprisal, cannot broadly or loosely be branded as illegal interference, restraint, or coercion.

"The pendency of a local labor dispute cannot be made to impose a legal gag upon the community."

Petitioner itself is not engaged in commerce and is not an employer within the meaning of the Act unless it may be said to be acting in the interest of some employer directly or indirectly.

In the original decision of the court, Justice Stephens dissented to the application of the order to persons and organizations not parties in the case. He pointed out,

"the only authority suggested by the Board and by the majority in this court is *N. L. R. B. v. Express Publishing Co.,* (1941), *supra.* Nothing remotely like this was before the court in that case, and nothing said in the Supreme Court's opinion has the slightest application to such a situation. The Board's cease and desist order in the cited case was directed to the respondent, Express Publishing Co., in relation to its treatment of its own employees. Sentences, general in nature, torn from their context in the Supreme Court's opinion cannot serve as authority for a proposition not in this case. For this Court's analysis of the Express Publishing Co. case see

National Labor Relations Board v. Pacific Gas & Electric Co., 118 Fed. (2d) 780, 789 (1941), as set out in the majority's concurring opinions."

It is noteworthy that when the court of its own volition amended its first judgment of August 30, 1945, by its order of March 2, 1946, Justice Stephens did not join in the order amending its former judgment. The majority of the court apparently based its amendment upon *N. L. R. B. v. Cheney California Lumber Co.*, 66 S. Ct. 553. The reasoning of the majority of the Circuit Court in issuing its order of March 2, 1946, amending the former judgment of the court, is certainly far from satisfactory. The *Cheney California Lumber* case has "nothing remotely like this case"; in the first place the Supreme Court pointed out that the judicial review of orders of the Board was limited by Section 10(e) of the Act to those objections which had been urged before the Board. In the *Cheney* case no exceptions were made to the intermediate report of the trial examiner and no objections raised until the matter came before the Circuit Court.

Petitioner would like to point out further that the omnibus clause 1(b) in the case at bar is broader than any other omnibus clause heretofore presented to this court for consideration in that it includes all the rights guaranteed by Section 7 of the Act to the employees of the canvas companies here involved and also all the rights guaranteed by Section 7 of the Act to the employees of any other employer not in any manner here involved.

For the reasons hereinabove stated petitioner contends that the decision of the Ninth Circuit Court of Appeals as amended is not supported by the authority cited by the court, to-wit, *N. L. R. B. v. Cheney California Lumber*

Co., supra, but is in conflict with the applicable decisions of this court. *May Department Stores Company v. N. L. R. B.,* 66 S. Ct. 203, *Phelps Dodge Corp. v. N. L. R. B.,* 313 U. S. 177, *N. L. R. B. v. Express Publishing Co.,* 312 U. S. 426.

II. Petitioner contends that the Ninth Circuit Court of Appeals erred in its decision, as amended, to the extent of depriving petitioner of due process of law, in that it predicated its essential findings of fact and conclusions of law upon which the judgment was based upon collateral facts foreign to the charge upon which the complaint of the Labor Board rested, which facts were introduced into the case either as so-called "background evidence," or as pure hearsay evidence, and otherwise lacking qualifications of legal evidence upon which such judgment must be predicated. For illustration the court finds:

A. "We thus have evidence from which the Board could infer that M & M through its corporate agent Ryerson, conspired with TNT, the agency of SCI, to violate the National Labor Relations Act by the formation of an employer dominated union in the canvas industry."

B. "That is to say, the conspiracy was of the canvas companies as employer principals and the institutional association as their employer agents."

C. "The evidence is clear from which the Board could infer that counsellor Ryerson [designated as counsellor by the Circuit Court for the first time] was not only acting within the scope of his authority as one of M & M's industrial relations staff, but that he was performing an authorized and expected counselling function in so conspiring to violate the Act."

D. "The executive committee of M & M in reorganizing that association after the enactment of the National Labor Relations Act, declared among its objectives the violation of the Act. It stated, 'The employer will have to be convinced of the necessity and benefits of bargaining collectively with his own employees, that is, the desirability of training his employees to deal with him directly rather than through an outside labor organization. Our contacts so far have indicated that many employers have not the slightest conception of how this result can be obtained. Advice, counsel, and assistance in the attainment of this objective will have to be given over a long period of time.'"

E. "In the conspiracy to violate the Act the M & M agents caused the incorporation of many industrial trade associations. * * * (Referring particularly to the garment industry.) The employer members of the associations so formed by M & M entered into illegal contracts, * * *" (Quoting some clauses from what purported to be blank printed forms of such association's contracts unexecuted.)

F. "Incidentally, this means that while M & M's corporate associations were advised by M & M to engage the bargaining services of such efficient members of the bar as attorneys Neary, Watkins, Howlett, and others for their anti-union activities, (the first time Neary's name is mentioned in the case, Watkins being attorney for SCI, and Howlett, ex-president of M & M, being attorney for some of the canvas companies) the worker employees not only could not employ experienced labor organizers, but could not even organize."

G. "With this background of M & M's illegal purpose, intent and accomplishment the Board was war-

ranted in inferring that all of M & M's extended labor activities in Southern California in the years since the passage of the National Labor Relations Act, in which it expended large sums of money, were infected with a like illegality."

Then follows a reference to the free employment bureau sponsored by M & M and testimony concerning the payment to a detective agency in providing guards and detectives during a strike. The court then finds:

"Whether such a labor employment bureau and such use of detectives and their employees in strike breaking activities in themselves could have been conducted without violation of the Act is not a matter of our concern. The sole question we decide is that in view of the evidence of other contemporaneous (the facts shown by such evidence were not contemporaneous) illegal (necessarily prejudged) anti-labor (prejudically characterized) activities, the Board could infer that they were but a part of a broad and long continuing conspiracy (no conspiracy charged in the complaint) to frustrate and thus violate the National Labor Relations Act."

It was upon the acceptance of such evidence and the finding of such facts as hereinabove quoted that the Board based its generalization and all-inclusive finding set forth in the petition for Writ of Certiorari under subsection C, Paragraph 3, Evidentary Questions Involved, Roman numeral III, Questions Involved, at page 10 of this petition, which is in effect that the unfair labor practices committed with reference to employees of the canvas companies were an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in the violation of the Act. Upon this conclusion the

Board attempts to justify, and the court in its order of March 2, 1946, amending its former judgment, attempts to justify the scope and extent of the injunctive relief granted.

This court has clearly stated the law in *Consolidated Edison Co., etc., et al. v. N. L. R. B.*, 305 U. S. 197,

> "The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statutes provide that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Rwy. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Substantiating the foregoing authority see *N. L. R. B. v. American Pearl Button Co. and Washington Chamber of Commerce, Washington, Iowa*, 149 F. (2d) 311; *Roberts & Oaks and the Chamber of Commerce of Madison, South Dakota, etc.*, 50 N. L. R. B. 494.

Proof of one fact may not be taken as even *prima facie* evidence of another fact that it has no reasonable tendency to establish, and if the judgment of the court rests upon

such evidence it is lacking in due process of law. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79. To the same effect, *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38.

The Act provides, Section 10(b), "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing, etc." This provision of the statute was followed in Section 10 of the complaint in which this respondent was specifically charged:

> "10. Respondents, Sun Tent-Luebbert Company; Mellus Brothers & Company, Inc.; Downie Brothers, Inc.; United Tent and Awning Company, Ltd.; California Canvas Jobbers Club; Southern Californians, Inc.; The Neutral Thousands, Inc.; G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service; and Merchants and Manufacturers Association of Los Angeles, acting together through their officers, agents and employees, on or about December 2, 1937, and thereafter, did instigate and form a labor organization referred to herein as the Independent, and since that date said respondents continuously have dominated and interfered with the formation and administration of said labor organization by the following acts:"

Any so-called background evidence must be admissible solely upon the grounds that it tends to prove the commission of the unfair labor practice charged. The admission of background evidence is an exception, limited in its scope, and it is not admissible for the purpose of proving any other violation of the Act than the one specifically

required by the statute to be stated in the complaint. *Wigmore,* Section 304, points this out:

> "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidence of Intent (*Ante,* Sec. 302)."

In the present case the Board admitted hearsay evidence, secondary evidence of all kinds and in particular statements of witnesses relating to the formation of other alleged company dominated unions in other companies. There was no proof that such unions had actually been formed, only fragmentary hearsay statements. Respondents had no notice of any such charges of unfair labor practices, or that any such evidence would be offered. These statements were denied categorically by the directors, officers and administrative agents of the respondent who testified, but they were found to be facts in both findings of the Board and findings and judgment of the Court.

In *Wigmore,* Vol. 2, page 204, Section 304, it states:

> "Two necessary limitations are to be observed in the use of this class of evidence of Design: (2) The object being to argue to the act charged from a design or plan to do it, the prior acts are received to show that system; since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments

of it would in effect violate the principle and remain in evidence merely as affecting the defendant's character, the trial court must pass upon the offer beforehand, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury; * * *"

Without reliance upon the hearsay evidence, collateral evidence and other evidence lacking in legal qualifications, including so-called background evidence of all kinds, the findings of the Board, particularly the all inclusive finding above quoted, could not have been made. There is no possibility of sustaining such finding upon any evidence relating to the charge of unfair labor practices specified in Section 10 of the complaint.

Therefore, petitioner maintains that such evidence was improperly admitted and erroneously relied upon to sustain the order of the Board and judgment of the court as amended, and that such error constituted lack of due process of law.

Petitioner furthermore contends that the judgment of the Ninth Circuit Court of Appeals as amended is in conflict with the applicable decisions of this court as the law is laid down in the cases hereinbefore cited, and the following Federal cases: *Cudahy Packing Co. v. N. L. R. B.*, 116 F. (2d) 367; *Magnolia Petroleum Co. v. N. L. R. B.*, 112 F. (2d) 545; *Everglades Drainage District v. Florida Ranch & Dairy Corp.*, 74 F. (2d) 914; *U. S. v. Nelson*, 102 F. (2d) 515.

III. The petitioner contends that the order of the Board, and the judgment of the Ninth Circuit Court of Appeals, as amended, enforcing the Order, abridge, directly and indirectly, the right of freedom of speech guaranteed by the First Amendment to the Constitution as effectually as by a direct mandate.

The M & M as a non-profit organization is not engaged in any business or commerce, and is dependent for its entire revenue upon initiation fees and dues from its members. Adherence to an active support of the principal of the open shop has characterized the organization for a number of years past. It has not been silent in proclaiming its adherence to this principal. A large part of the evidence admitted from the files of M & M bore upon this subject. When the court enforces the order of the Board directing this petitioner to "cease and desist from collecting moneys, etc.", and "to notify, etc." it effectually cuts off sources of revenue from which the M & M derives the means to express its views. Admittedly if the collection of moneys which are to be expended for certain purposes is enjoined the contributors of M & M are going to cease their contributions, when the expenditure of such contributions might later be found to be unlawful labor practices because coupled with other acts. The order of the Board and the judgment of the Court would destroy the organization because of fear of the possibility of contempt proceedings being brought against any such contributor.

The obvious limitation upon the right of freedom of speech by such indirection, or oblique effect of the judgment of the court enforcing the order of the Board, is no less a violation of the constitutional right of freedom of speech because it is an indirect effect. For this reason the judgment of the court as amended is in conflict with the applicable decisions of this Court. *Thomas v. Collins,* 323 U. S. 819; 65 S. Ct. 315. In the last named case the Court finds, page 530,

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when the right is exercised in conjunction with peaceable assembly. * * * This conjunction of liberties (contained in the First Amendment) is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Citing cases."

Marsh v. State of Alabama, 66 S. Ct. 276, decided Jan. 7, 1946, likewise substantiates the proposition that the freedom of speech may not be abridged indirectly any more than it can be abridged directly. The Court points out,

> "* * * the right to exercise the liberties safeguarded by the First Amendment 'lies at the founda-

tion of free government by free men' and we must in all cases 'weigh the circumstances and appraise * * * * the reasons * * * in support of the regulation of (those) rights.' *Schneider v. State,* 308 U. S. 147."

IV. Petitioner contends that the judgment of the court as amended enforcing the order of the Board does in fact deprive this petitioner of its property without due process of law in that it prevents M & M from entering into any contractual relationship with its members whereby its members contribute funds to the M & M for purposes *ab initio* lawful in themselves, but which, by reason of being connected with other acts at a later time for which the M & M might be legally held responsible, become unlawful and thereby subject the M & M and its members and contributors to the jeopardy of contempt proceedings for violation of the court's judgment. See cases previously cited, and *Bridges v. California,* 314 U. S. 252.

In conclusion it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action.

Respectfully submitted,

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700749—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 109

MERCHANTS AND MANUFACTURERS ASSOCIATION OF LOS ANGELES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinions of the court below (R. XXII, 10064–10083) are reported at 151 F. 2d 483. The memorandum opinions of the court, on cross petitions for rehearing (R. XXII, 10089–10091), are reported at 151 F. 2d 490. The opinion and order of the court amending its original opinion by ordering enforcement of the Board's order in full (R. XXII, 10091–10094) is reported at 154 F. 2d 108. The findings of fact, conclusions of law, and order of the National Labor Re-

lations Board (R. III, 1155–1243) are reported at 37 N. L. R. B. 50.

JURISDICTION

The decree of the court below was entered on August 30, 1945 (R. XXII, 10083–10089). Petitions for rehearing, filed by the petitioner and the Board, were denied on December 28, 1945 (R. XXII, 10089–10091). The decree was modified so as to enforce the Board's order in full by an order of the court filed on March 2, 1946 (R. XXII, 10091–10094). The petition for a writ of certiorari was filed on May 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the order of the National Labor Relations Board was based on evidence and findings irrelevant to the issues tendered by the complaint.

2. Whether there is substantial evidence to support the findings of the Board in the instant case:

(a) that the petitioner, an association of employers, acted in the interest of its member employers and was accordingly an employer within the meaning of Section 2 (2) of the Act,[1]

[1] The question presented by petitioner (Pet. 10), whether it is engaged in commerce within the meaning of the Act, is not involved in this case. Under Section 10 (a) of the

(b) that the association of employers engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act, and

(c) that the unfair labor practices found to have been committed by the association of employers were an integral part of a coordinated scheme or plan by the association of employers to assist all employers of Southern California in interfering with employee rights guaranteed by the Act, that such plan if again applied would inevitably bring about further violations of the Act, and that it was therefore necessary to prevent the commission of similar unfair labor practices by the association of employers acting in the interest of any employer.

3. If the answer to question 2 is "yes", whether the Board may properly order the association of employers:

(a) to cease and desist from dominating, interfering with, or supporting any labor organization among the employees of any employer,

(b) to cease and desist from soliciting and collecting funds from any employer to be used for the purpose of interfering with the rights guaranteed in Section 7 of the Act, and

(c) to cease and desist from in any other manner interfering with, restraining, or coercing the

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National Labor Relations Act, Appendix, *infra*, p. 29, the Board need only find, as it did (R. III, 1232–1233, that petitioner's unfair labor practices affected commerce.

employees of any employer in the exercise of the rights guaranteed in Section 7 of the Act.

4. Whether the provisions of the order set forth in question 3 (b) deny to petitioner its constitutional right of free speech.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 28–30.

STATEMENT

On charges duly filed (R. I, 1–46), the Board, on September 26, 1939, issued its complaint against the ten following respondents (R. I, 53–79): Sun Tent-Luebbert Company, Mellus Brothers and Company, Inc., Downie Brothers, Inc., and United Tent and Awning Company, Ltd. (which four companies are herein referred to as the Canvas Companies); Southern Californians, Inc., The Neutral Thousands, Inc., herein called TNT, G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service, and Merchants and Manufacturers Association of Los Angeles, herein called M&M (which five respondents are collectively referred to herein as the institutional parties); and California Canvas Jobbers Club. The Board subsequently dismissed the complaint against the last named respondent (R. III, 1243) and it is not further referred to herein.

The Board's complaint alleged, *inter alia,* that the Canvas Companies were engaged in the manufacture and distribution of canvas goods in interstate commerce (R. I, 54–55, pars. 1–2); that petitioner, M&M, was an organization generally engaged in forming employer-dominated unions and in otherwise denying to employees of its members the rights guaranteed under the Act (R. I, 63–65, par. 7); that M&M and the other institutional parties had acted on behalf of the Canvas Companies in regard to the employment of workers and that they were employers within the meaning of Section 2 (2) of the Act (R. I, 65, par. 8); that all of the respondents including M&M, acting together, on and after December 2, 1937, had instigated and formed a labor organization, referred to herein as the Independent, and had dominated and interfered with its formation and administration by certain specified acts, in violation of Section 8 (2) of the Act (R. I, 66–69, par. 10); that certain contracts entered into with the Independent were a result of the unfair labor practices above set forth and that they were entered into as part of a plan of interference with the rights of the Canvas Companies' employees under the Act (R. I, 69–70, par. 11); that by the acts described above, respondents had violated Section 8 (1) of the Act (R. I, 70, par. 12); that the Canvas Companies, through the institutional parties, prior to and since December 2, 1937, had engaged in a plan

of interference with the self-organization of their employees, consisting of certain specified acts, and that by these acts all respondents had interfered with the statutory rights of the Canvas Companies' employees, in violation of Section 8 (1) of the Act (R. I, 70–75, par. 13); and that the acts of the institutional parties and the Canvas Companies in violation of Section 8 (1) and (2) of the Act, as set forth, *inter alia,* in paragraphs 10 to 13, summarily described above, *supra,* pp. 5–6, taken together with the operations of M&M and the other institutional parties as set forth, *inter alia,* in paragraphs 7 and 8, summarily described above, *supra,* p. 5, had a close, intimate, and substantial relation to interstate commerce and had led and tended to lead to labor disputes burdening commerce (R. I, 77–78, par. 19).

Answers to the complaint were filed by the various respondents (R. I, 83–145). The answer of petitioner M&M (R. I, 93–100) specifically denied the allegations of paragraph 7 of the complaint and all the other allegations described above except those with respect to the nature of the operations of the Canvas Companies.

After further appropriate proceedings, the Board on November 29, 1941, issued its findings of fact, conclusions of law, and order (R. III, 1155–1243). Insofar as relevant to the questions raised by the petition for certiorari, the findings and

supporting evidence may be summarized as follows:[2]

The four Canvas Companies are engaged at their plants at Los Angeles, California, in the manufacture and distribution of tents, out-door furniture, and other canvas goods; they cause substantial amounts of raw material and finished products to move in interstate commerce (R. III, 1162–1164; VII, 3184–3186, IX, 4029–4032, 4100–4103, 4231–4234, XVI, 7804–7805, I, 231–232, VIII, 3470–3471). Southern Californians, Inc., is a non-profit corporation with membership limited to persons and firms in California (R. III, 1164–1165; VI, 2620–2626, 2738–2755, XVII, 7926–7931). TNT is a non-profit California corporation with membership limited to women, and was incorporated "exclusively for educational purposes" (R. III, 1165–1166; VI, 2469, 2482–2483, VII, 3127–3142). Employees Advisory Service is a partnership consisting of Glancy L. Huff and Clay C. Rittenhouse, supported by and operated under supervision of Southern Californians, Inc. (R. III, 1166; I, 85, V, 2329–2330, 2344–2345, XIV, 6532–6533). M & M is a California corporation admitting to membership any person or enterprise engaging in any business requiring employment of labor (R. III, 1166–1167; XI, 5317–5334).

[2] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Unions affiliated with the American Federation of Labor and the Congress of Industrial Organizations began to organize the Canvas Companies' employees during 1937 (R. III, 1167–1168; IV, 1674–1677, V, 1953–1954, 2096–2099, VII, 3199–3200, 3203–3204, 3401–3403, VIII, 3587–3588, 3711, 3886–3887, XIII, 5932–5934, 5938), and these organizational activities were known to officials of the Canvas Companies (R. III, 1168; VII, 3190–3194, 3226, 3231–3234, 3400–3401, VIII, 3583–3586, 3725–3726, IX, 3980). During November, 1937, Factory Superintendent Everson selected three employees at Mellus Brothers who met with two or three supervisory and non-supervisory employees from each of the other Canvas Companies; the meeting took place in the Mellus plant and on company time (R. III, 1169, 1170; IV, 1547–1563, V, 1957–1958, 2019–2020, VII, 3026–3029, VIII, 3877–3882, XI, 4910–4913, 4930–4933, XII, 5791–5798, XIII, 5931–5933, 6299–6307). Superintendent Everson introduced Rittenhouse and Huff who urged formation of an "independent" union (R. III, 1170; IV, 1559, 1564, V, 1946–1947, VII, 3030, XI, 4915–4918, XIII, 6303–6305, 6309–6320). When the employees raised the then pressing problem of a disparity in the wages paid at the four plants, Rittenhouse assured them that this could be corrected through a contract with an "independent" union (R. III, 1170; XIII, 6310–6311). Similar assurances by Rittenhouse were

given at two subsequent meetings, one at the Mellus plant and one at TNT headquarters; two of these meetings, together lasting for three and one-half hours of working time, were attended by a committee of employees without loss of pay (R. III, 1170, 1171; IV, 1569–1570, XI, 4919–4921, XIII, 5935–5936, 6323–6326, 6330–6332). The meeting at TNT headquarters, on Rittenhouse's suggestion, adjourned to the office of an attorney whom the committee retained (R. III, 1171; IV, 1569–1571, XI, 4945, XIII, 6331–6337). Three days later, the attorney filed articles of incorporation signed by the employees' committee (R. III, 1171–1172; IV, 1571, 1644–1656, 1782–1792).

Meanwhile, membership cards were supplied by Rittenhouse or Huff, and a membership campaign was conducted at the four Canvas Companies' plants during working hours and with the active assistance of supervisory employees (R. III, 1172–1173; IV, 1573, 1588, 1614, 1619–1620, 1622–1623, 1792–1793, 1880–1881, 1916–1918, V, 1959–1963, 1966–1968, 2162–2165, VII, 3020–3031, 3050–3051, 3284, VIII, 3884–3885, IX, 3984, XII, 5791–5794, 5797–5799, 5804–5806, 5819, XIII, 5931–5933, 6000–6001).

At the first meeting of the Independent after incorporation, the officers who were elected included several supervisory employees (R. III, 1173; IV, 1539, 1609, 1886, 1932–1933, VII, 3026–

3027, 3030–3031, XIII, 5937–5938). On January 11, 1938, when representatives of the Independent met for the first time with representatives of the Canvas Companies, the Independent's claim that it represented a majority of the employees was accepted by the Canvas Companies without question (R. III, 1173–1174; IV, 1797–1799, VII, 3234–3236, VII, 3425–3428, 3598–3601, IX, 3931–3932, 4149–4152). After further negotiations, in which Huff played an active part, a contract was executed on February 7, 1938 (R. III, 1174–1175; IV, 1795–1799, 1857–1859, 1869–1877, V, 2042–2043, XI, 4901–4906, 4966–4968, 4974–4976). Although some of the contract provisions relating to working conditions were thereafter not strictly enforced (R. III, 1176–1177; V, 2151–2152), the limited preferential hiring provisions of the contract (IV, 1870, 1874) were strictly enforced and were indeed expanded to assure to the Independent an even greater degree of security than was called for by the contract terms (R. III, 1176–1177; IV, 1591–1592, 1615–1618, V, 2177, IX, 4173, 4187–4188, XI, 5031–5032).

The Independent met without cost at the offices of TNT and was guided largely by Huff who prepared its minute books and directed its meetings (R. III, 1176; IV, 1637–1642, 1674, 1679–1680, V, 2061–2062, 2177, VIII, 3447–3448, 3888, XI, 4927–4928, 4961–4968, 5112–5113, XII, 5425, XV, 7012–7014). In addition, Huff actively campaigned to

defeat efforts of outside unions to displace the Independent (R. III, 1177–1178; VIII, 3636–3638, 3720–3721, 3895–3896, XII, 5807–5808, XIII, 5951–5954). He also assumed the dual role of "business agent" for the Independent and "impartial party" for the employers and the Independent (R. III, 1173; IV, 1669–1672, VIII, 3894–3895, IX, 4166–4167, XI, 4898–4901, 4926–4927, 5062).

The Board found that the formation and administration of the Independent as described above was a joint effort of all the respondents and was an integral part of a general scheme or plan of all the institutional parties to lend their services to employers in effectuating the so-called "open shop" program throughout Southern California (R. III, 1224). In making this finding and in evaluating the evidence regarding the part played by M&M and the other institutional parties in the formation of the Independent, the Board took into consideration the industrial relations activities of the institutional parties in other industries (R. III, 1227).

Thus, the Board found that in 1936 and thereafter, M&M repeatedly put itself on record as supporting the "open shop" (R. III, 1204–1205; XI, 5363–5364, XIV, 6849–6852, XX, 9433–9448), and that the activities of M&M during this period showed that its "open shop" policy was designed to cover a deliberate anti-union policy (R. III,

1205). Among other things, M&M engaged in a propaganda campaign against unions and exhorted employers to deal only with their own employees (R. III, 1205–1206; XIX, 9002–9004, XX, 9433–9448, XXI, 9829–9833); it participated actively in the formation of trade associations whose members pledged themselves by contract to adhere to certain anti-union policies (R. III, 1206; XIV, 6711, 6714, 6735–6748, 6767–6780, 6810–6814, 6836–6838, 6844, 6850–6851, 6857–6858, XIX, 9318–9319); it provided strike-breaking services to M&M members (R. III, 1206; XIV, 6784–6786, XV, 6871–6872, XIX, 9292–9294, XX, 9425–9428, 9433, 9437–9439, 9442); and it maintained a free employment service for non-union employees (R. III, 1206–1207; XII, 5615–5616, 5726–5728, XVII, 8827–8833).

In August 1937, a representative of M&M arranged with Rittenhouse and Huff to refer to them employer requests for formation of unaffiliated unions, and Rittenhouse and Huff fulfilled several such assignments in the ensuing months (R. III, 1197; X, 4827–4840, 4851–4859, XIII, 6051–6059, 6069–6082, 6098, 6151–6185, 6208–6216, XV, 7229–7230, XVII, 8016–8019, 8121, 8125). TNT was incorporated on October 2, 1937, and Rittenhouse and Huff joined its staff on November 1, 1937, to devote themselves exclusively to forming "independents" (R. III, 1165, 1194, 1195; IX, 4280–4286, X, 4814–4815,

XIII, 6199–6200, XIV, 6665). Their formation of various such "independents" in different industries was coordinated by M&M chiefly through Harold Ryerson, an employee of M&M, who told them which companies to organize and gave them lists of "key" employees designated by the employer and Ryerson as reliable (R. III, 1195, 1197, 1198, 1199; VI, 2526–2528, XI, 5246–5247, XII, 5427–5432, 5611–5612, XII, 6165, 6344–6345, 6350–6358, XIV, 6649–6654, XV, 7126–7132, XVII, 8697–8698, 8727, XIX, 8941–8949, 9154–9156, XXI, 9747–9756, 9808–9810). The TNT formula generally called for rapid establishment of unaffiliated unions when outside organization was threatened, for careful supervision of such unions by TNT, and for restriction of their activities to social affairs so far as possible (R. III, 1197–1204; IX, 4326–4344, XIII, 6090–6098, XVII, 8086–8102, XXI, 9809). TNT also supported the "open shop" formula of M&M by extensive publicity activities (R. III, 1207; IV, 1685–1689, 1701–1705, 1742–1782).

Southern Californians, Inc. also participated in the formation and control of the Independent (R. III, 1220). It served as a "Community Chest for labor problems, and to coordinate the efforts of all existing employer groups" (R. III, 1211; XIX, 9019). As such, it contributed substantially to the support of M&M and, through interlocking leadership and careful coordination, it arranged

with that organization a systematic division of tasks (R. III, 1211–1214; VI, 2514–2515, 2552–2584, 2657–2664, 2676–2694, VII, 2972–2977, XII, 5862–5866, XIII, 5900–5901, 6020–6029, 6042–6045, XIV, 6706–6710, XV, 7224, XIX, 8907–8917, 8952–8956, 9019, 9086–9088). In addition, substantially all the activities of TNT were financed by Southern Californians, the total subsidy coming to $87,000 (R. III, 1212, 1214; VI, 2633–2640, 2883–2884, VII, 2966, 3119–3121, 3143–3144, IX, 4297–4298, X, 4557, 4560, XIII, 5901–5902). The use which TNT made of Southern Californians' funds was closely supervised by Southern Californians and checked by repeated investigations of TNT activities (R. III, 1214–1220; V, 2201–2213, 2224–2227, 2244–2246, 2285–2293, 2301, 2410–2411, VI, 2518–2519, 2529, 2585–2587, 2640–2644, 2650–2655, IX, 4297– 4298, 4302–4305, X, 4441–4444, 4611–4618, XI, 5073–5085). After TNT was abandoned in March 1939, Southern Californians continued to direct the "independent" organizing activities of Rittenhouse and Huff in their new venture, Employees Advisory Service, which was completely subsidized by Southern Californians (R. III, 1219–1222; I, 85, V, 2328–2336, 2344–2346, 2351–2352, 2356, 2413–2415, VII, 3021–3024, IX, 4306–4308, XI, 5113–5116, 5121–5126, 5128–5141, 5171–5177, 5213, XIV, 6531–6538, 6617–6620, XVII, 7933–7934).

This was the general pattern; the launching of

the Independent, as described above (pp. 8–11), completely conformed to this pattern. Mellus Brothers was a member of M&M for many years before 1937 and the other three Canvas Companies joined that organization on December 1, 1937, to help keep Los Angeles an "open shop town" (R. III, 1186–1187; VI, 2510–2512, VII, 3262, VIII, 3646, 3704–3707, IX, 4110, 4141, 4221–4223). Prior to that time, and about a month before emergence of the Independent, a representative of M&M met with officers of the Canvas Companies (R. III, 1186; VII, 3267–3274, 3281–3282, VIII, 3442–3445, 3646–3647, 3662–3665, IX, 3954–3960, 4147, 4223–4226, XI, 5378–5379). In May 1938, the four companies joined Southern Californians and thereafter paid dues to it, in "gratitude for the work done for them" (R. III, 1193, 1209–1210; VI, 2695–2702, VII, 2949–2954, 3163–3165, 3292–3293, IX, 4018–4023, 4050–4051, 4201–4215, XI, 4995–4997, XII, 5408–5409); as shown above (p. 14), at this very time Southern Californians was subsidizing TNT, which in turn, through its employees, Rittenhouse and Huff, was sponsoring and maintaining the Independent which they had organized among the Canvas Companies' employees. The activity of Rittenhouse and Huff at the Canvas Companies was undertaken pursuant to instructions given them at the offices of TNT by M&M's Ryerson, and the persons with whom they communicated at the plants were those named

by Ryerson (R. III, 1179–1180; XI, 4928–4933, XIII, 6226–6239, 6267–6275, 6279, 6286–6289, XV, 7127, 7144, 7254–7256). Rittenhouse and Huff reported on their activities to Ryerson, and through their reports were able to arrange with the companies the basis for the assurances later given to the employees (*supra,* p. 8) that the wage disparity would be ironed out in a contract with an "independent" union (R. III, 1180–1181; XIII, 6289–6290, 6323–6326, 6339–6340, XV, 7125–7127). Even the Independent's attorney (*supra,* p. 9) was designated by Ryerson (R. III, 1181; XIII, 6332). Documentary evidence from TNT's files plainly reveals the coordinated activities which led to the formation of the Independent (R. III, 1192–1193; XVII, 8014–8015, 8093–8097, 8108–8111).

On all these facts, the Board concluded (R. III, 1223–1228) that the Independent came into being as the joint effort of the Canvas Companies and the institutional parties and as an integral part of a general scheme or plan of the institutional parties to effectuate the "open shop" program throughout Southern California (R. III, 1224); that the Canvas Companies, in order to defeat the current A. F. L. and C. I. O. organizing campaigns, turned to and became members of M&M and adopted the M&M and TNT formula which called for the establishment of an unaffiliated union among their employees (R. III, 1224–1225); that M&M formulated the plan for combatting the

C. I. O. and A. F. L. organizing drives (R. III, 1226); that the plan was executed by TNT and later by Employees Advisory Service, in accordance with M&M's instructions and under the supervision of Southern Californians (R. III, 1226–1227); and that the plan was financed by Southern Californians (R. III, 1227). The Board found that in view of the participation of the institutional parties as agents of the Canvas Companies in the formation of the Independent, they were employers of the Canvas Companies' employees within the meaning of Section 2 (2) of the Act (R. III, 1227); it further found that "the history of the Independent constitutes but one of many similar chapters in the contemporary annals of the coordinated industrial relations activities of the institutional" parties (R. III, 1227). Accordingly, the Board concluded that the Canvas Companies and the institutional parties, acting in concert, had dominated and interfered with the formation and administration of the Independent and had contributed financial and other support to it, thereby interfering with, restraining, and coercing the employees of the Canvas Companies in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) and (2) of the Act (R. 1227–1228, 1237).

The Board carefully considered the nature of the remedial order to be issued. It held that since all of the respondents before it, acting in concert, had illegally formed and dominated the Inde-

pendent, it would direct each of them to cease and desist from these unfair labor practices and from the conduct which resulted in the concerted violations of the Act (R. III, 1233). After specifying the nature of the order to be directed against the Canvas Companies, it stated (R. III, 1234–1236):

> Moreover, as we have found, the unfair labor practices committed by the respondents with respect to the employees of the canvas companies were in fact executed as an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to such employees under the Act. Such coordinated plan, if again applied, will inevitably bring about a further concerted violation of the Act, similar in kind to the unfair labor practices found. Since the institutional respondents have publicly and persistently invited all employers of Southern California to enlist their services in introducing such plan among their employees, it is reasonable to assume, and we find, that the institutional respondents are fully equipped for, and ready to proceed with, the commission of similar unfair labor practices with respect to the employees of other employers, unless ordered to refrain from so doing [citation omitted]. We, therefore, deem it necessary to prevent the commission of such sim-

> ilar unfair labor practices by the institutional respondents, acting in the interest of other employers, and we shall, accordingly, order such respondents to cease and desist from in any other manner, severally, jointly, or in concert with other employers, interfering with the rights guaranteed to employees in Section 7 of the Act. Toward the same end, we shall direct the institutional respondents to notify all persons to whom they have offered their illegal plan that they have in effect abandoned such plan.

Accordingly, the Board's order directed the institutional parties, including M&M, in paragraph 3 (a) (1), to cease and desist from dominating, interfering with, or supporting the Independent or any other labor organization of the employees of any employer; in paragraph 3 (a) (2), to cease and desist from soliciting and collecting funds from any employer to be used for the purpose of interfering with the rights guaranteed in Section 7 of the Act; in paragraph 3 (a) (3), to cease and desist from in any other manner interfering with, restraining, or coercing the employees of any employer in the exercise of the rights guaranteed in Section 7 of the Act; and, in paragraph 3 (b), to send notices by mail to all of its members and those on its mailing list stating that it would not engage in the conduct from which it was ordered to cease and desist (R. III, 1241–1243).

On August 23, 1943, the Board filed in the court below a petition for enforcement of its order (R. III, 1253–1264). M&M was the only one of the nine respondents named in the Board's order which appeared by counsel or filed a brief in opposition to the petition for enforcement (R. XXII, 10065). On August 20, 1945, the court below handed down its opinion (R. XXII, 10064–10080), in which it upheld all of the Board's findings; it nevertheless ordered elimination of paragraphs 3 (a) (2) and 3 (a) (3) of the Board's order which dealt respectively with solicitation of funds by M&M and interference generally with employee rights under the Act (R. XXII, 10080). Judge Stephens dissented from the holding of the majority insofar as it approved "application of the order to persons and organizations not parties in the case" (R. XXII, 10080–10083). A decree in accordance with the court's opinion was entered on August 30, 1945. Petitions for rehearing thereafter filed by the Board and M&M were denied by the Court on December 28, 1945 (R. XXII, 10089–10091). On March 2, 1946, following issuance of this Court's decision in *National Labor Relations Board* v. *Cheney California Lumber Co.,* No. 319, October Term, 1945, the court below entered an order modifying the decree previously entered so as to enforce the order of the Board in full (R. XXII, 10091–10094). On the same day, the decree was accordingly amended (R. XXII, 10083–10089).

ARGUMENT

1. Petitioner's first contention (Pet. 8, 10–11, 20–26) appears to be that the Board improperly admitted in evidence and relied upon collateral facts unrelated to the charges of unfair labor practices before it. It seems to assert that the pleadings limited the issues merely to petitioner's instigation and organization of a company-dominated union among the Canvas Companies' employees and that proof of petitioner's practices among other employees was irrelevent (Pet. 10–11, 22). But in taking this limited view of the pleadings, petitioner wholly ignores Paragraph 7 of the Board's complaint (R. I, 63–65; *supra,* p. 5) which was specifically denied and put in issue by petitioner's answer (R. I, 94–95). Paragraph 7 alleged that petitioner was engaged in forming employer-dominated unions for its members and generally in denying to the employees of its members the rights guaranteed by the Act (R. I, 64). These controverted allegations of the commission of unlawful practices by petitioner not only among the Canvas Companies' employees but among the employees of its members generally provided ample basis for the introduction of evidence to support them. The issues which they created were fully litigated before the Board and were properly considered and resolved. Petitioner's failure to refer to Paragraph 7 of the complaint points up what is in any event clear: that neither the evidence to which petitioner objects nor the Board's findings thereon went beyond the issues

framed by that paragraph and by petitioner's denial thereof. Petitioner unquestionably "understood the issue and was afforded full opportunity to justify" its conduct. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 350.[3]

Moreover, in addition to supporting Paragraph 7 of the complaint, the evidence concerning petitioner's unlawful activities among the employees of other employers was relevant to the issue concerning petitioner's participation in the unfair labor practices involving the Canvas Companies' employees since it tended to show, and as the Board subsequently found (*supra*, p. 18) did show, a "design or plan" to engage in such violations.[4] The evidence, therefore, was properly admitted. Furthermore, the propriety of its admission presents no question of general importance requiring review by this Court.

2. Petitioner attacks as unsupported by substantial evidence (Pet. 9–11, 23–26) the Board's

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[3] If petitioner's contention is that the Board is limited to the allegations of the charge or charges which initiated this proceeding (see Pet. 20), its position is plainly without merit. "When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18.

[4] Wigmore on Evidence, 3d edition, Sec. 304, Vol. II, p. 202; *New York Mutual Life Insurance Co.* v. *Armstrong*, 117 U. S. 591, 598; *Banning* v. *United States*, 130 F. 2d 330, 334–335 (C. C. A. 6); *United States* v. *Seeman*, 115 F. 2d 371, 373 (C. C. A. 2); *Johnson* v. *United States*, 82 F. 2d 500, 504–505 (C. C. A. 6); *Wood* v. *United States*, 16 Pet. 342, 359–361.

findings that petitioner engaged in unfair labor practices, that it was an "employer" within the meaning of the Act, and that petitioner's unfair labor practices were executed as part of a coordinated scheme or plan of all the institutional parties to coerce employees of all employers in Southern California in the exercise of their rights under the Act. The evidence summarized in the Statement (*supra*, pp. 4–20) affords full support for the challenged findings. Petitioner's bare allegation (Pet. 10, 25) that the Board admitted hearsay and other incompetent evidence is not accompanied by "appropriate references to the record" (*Furness, Withy and Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, 434); in any event, as the court below pointed out, "ample evidence remains to support the Board's findings" (R. XXII, 10077).

3. Petitioner contends (Pet. 8, 12, 15–20) that the Board's remedial order is too broad because it bars petitioner from interfering with and coercing not only the employees of the Canvas Companies but also the employees of any other employer. The remedy was entirely appropriate upon the record made in this case and was formulated only after careful consideration by both the Trial Examiner (R. I, 451–456, 470–475) and the Board (R. III, 1233–1237) of the scope and nature of petitioner's unlawful conduct. As the Board made clear in its findings (R. III, 1234–1236; *supra*, pp. 18–19), petitioner's unfair labor practices were not isolated acts limited

to the employees of the Canvas Companies but were "an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in interfering with, restraining, and coercing their employees * * *." The Board further found (*ibid.*) that petitioner stood ready to carry out the coordinated plan with respect to other employees unless restrained from so doing. Accordingly the Board, to effectuate the policies of the Act, issued its order to prevent petitioner from carrying out this unlawful plan. The court below properly sustained the order for, as it pointed out (R. XXII, 10080):

> Here there was a general attitude and conduct which the Board could infer evidenced an intent to nullify the National Labor Relations Act for all employers and employees in Southern California.

The Board's action in restraining continuance of the coordinated plan of violations with respect to other employees is well within the principles established by this Court. "The relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 348. And as this Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437:

> The breadth of the order, like the injunction of a court, must depend upon the cir-

> cumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past.

It further held that where "the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future," the order could be drawn broadly enough to halt such efforts (312 U. S., at 437–438). Here, the Board found on ample evidence that such threats did exist and that (R. III, 1235):

> We, therefore, deem it necessary to prevent the commission of such similar unfair labor practices by the institutional respondents, acting in the interest of other employers, and we shall, accordingly, order such respondents to cease and desist from in any other manner, severally, jointly, or in concert with other employers, interfering with the rights guaranteed to employees in Section 7 of the Act.

On the record in this case we think it clear that this finding and the order based thereon were a proper exercise of the Board's "informed discretion" with respect to remedial orders. *Phelps*

Dodge Corp. v. *National Labor Relations Board,* 313 U. S. 177, 195.[5]

Petitioner further objects (Pet. 9, 19) to the so-called omnibus provision enjoining it from any violations of the rights guaranteed in Section 7 of the Act. This type of order was upheld by this Court in *National Labor Relations Board* v. *Cheney California Lumber Co.,* No. 319, October Term, 1945, decided February 25, 1946, upon violations less extensive than those disclosed upon the record herein. Under the principles of the *Cheney* and *Express Publishing* cases, *supra,* the order is amply justified.

4. Petitioner attacks (Pet. 9, 12, 27–29), as contrary to the Constitutional guarantee of free speech, the provision of the Board's order (R. III, 1242) forbidding petitioner to solicit and collect funds to be used for the purpose of interfering with the rights guaranteed in Section 7 of the Act. Petitioner's reliance on the First Amendment is difficult to understand for no question of free speech is remotely involved. The Board's order in no way affects the expression of opinion. It does no more than restrain petitioner from the concrete act of soliciting and collecting funds to be used to finance violations of the Act.

[5] The decision below is in accord with an earlier decision of the same court enforcing a similar order over the objection of the organization there involved. *National Labor Relations Board* v. *Holtville Ice & Cold Storage Co.*, 148 F. 2d 168 (C. C. A. 9), enforcing 51 N. L. R. B. 596. There are no contrary decisions.

Petitioner is not forbidden to solicit funds to be used for purposes protected by the First Amendment or for other lawful purposes. It is only restrained from soliciting and using funds for the unlawful purpose of violating the Act. Just as coercion in general is not shielded by the First Amendment (*Thomas* v. *Collins,* 323 U. S. 516, 537–538), so solicitation of funds to be used for coercion is likewise unprotected. As the court below pointed out (R. XXII, 10074), petitioner, throughout this litigation, has used the term "free speech" as a "euphemistic slogan" to conceal its conspiracy to violate the Act. Its present reliance on the First Amendment is of similar character.

Equally groundless is petitioner's objection to the order based on "due process" (Pet. 11, 12, 29). The order does not restrain employers from contributing money to petitioner for lawful purposes.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1946.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly * * *

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published

by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in

the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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